No. 22243

United States Court of Appeals
For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., INC., *Appellant,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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I

ANSWER TO APPELLEE'S ARGUMENT THAT THE HUMPLA LAW SUIT WAS NOT AN EMPLOYER'S LIABILITY

Appellee argues that, all elements of construction aside, Coverage One (b) does not apply to a Humpla-type law suit since the liability theory under which Humpla asserted his claim was against a shipowner and not an employer. To reach this conclusion Appellee completely ignores the status of Humpla as a direct employee of Pacific Inland Navigation Company.

Appellee argues (Appellee's brief, p. 12, 13) that historically a Humpla-type law suit would not be

covered under this coverage. This does not follow. Humpla was undeniably an employee of Appellant. The opening statement of the policy in question emphasizes the basic factor of the employer-employee relationship as the very foundation of the policy. Only if Coverage One (b) can be read out of the policy can coverage be escaped.

Appellee refers often to compensation coverage and P&I coverage, implying this case can be solved merely by defining types of insurance coverage and inserting such facts as Appellee chooses (Appellee's brief, p. 13, 14 and 16). This attempt at solution by classification completely ignores the plain language of the contract of insurance in question.

The fallacy in employing this argument of classification is evidenced in Appellee's citation of *Indemnity Insurance Co. v. California Stevedore & Ballast Co.* (Appellee's Brief p. 13). Appellee cited this case for the rule that where an independent stevedore and employer is sued by a vessel owner for injuries occurring on a vessel to a longshoreman, the liability of the stevedore-employer is within its public liability policy rather than its employer's liability policy.

The *Indemnity* case is clearly distinguishable from this action because of the significant differences in wording of the policies involved. The pertinent parts of the policy of insurance in *Indemnity* are cited at 307 F.2d 513, 515 n. 1. Coverage A in that policy pertains to coverage for bodily injury liability. Exclusion (c) makes coverage A inapplicable "except with respect to liability assumed under written contract * * * ." Since the case dealt with shipowner indemnity from a stevedore-employer, based on the contractual

relation between the two, the exception stated within Exclusion (c) rendered that exclusion inapplicable, resulting in coverage under Clause A.

Exclusion (c) in the *Indemnity* case, as Appellee points out in its brief at page 13, referred to Workmen's Compensation liability. This was so because of the particular wording of Exclusion (c):

> "This policy does not apply under coverage A ... to bodily injury ... of an employee of insured ... other than a domestic employee for whose injury benefits are not payable or required to be provided under any *workmen's compensation law;* or to any obligation for which the insured ... may be held liable under any *workmen's compensation law;* ..." (Emphasis added) 307 F.2d 513, 515, n. 1.

In this particular case, under Policy LS-1214, nothing in Coverage One (b) restricts its applicability in the manner Appellee contends. Quite to the contrary, since Coverage One (a) clearly deals with compensation, Coverage One (b) is left to cover other types of liability to which Appellant may be subjected by reason of the employer-employee relationship.

II

ANSWER TO APPELLEE'S ARGUMENT THAT POLICY LS-1214 COVERS ONLY LONGSHOREMEN'S AND HARBOR WORKERS' ACT BENEFITS

Only by excluding Coverage One (b) of this policy can Appellee escape liability. Where, then, is the exclusion?

It is clear from a reading of the policy that Coverage One (a) and Endorsement No. 1 that the Longshoremen and Harborworkers' Compensation Act is covered by this policy. As Appellee states in its brief (p. 5), Endorsement No. 1 is inclusive and not restrictive. As Appellee states, other compensation acts could presumably be added. This concession by Appellee indicates the very reason for the existence of Endorsement No. 2, that is, to limit the compensation acts covered to only the Longshoremen and Harbor Workers' Compensation Act.

While the restriction on Coverage One (a) is clear, there is no such clear restriction on Coverage One (b). The second paragraph in Endorsement No. 2 falls far short of the clear exclusion or restriction of Coverage One (b) that the rules of construction require.

Appellee states that the only basis for the presence of Coverage One (b) is in the event the Longshoremen and Harbor Workers' Compensation Act is declared unconstitutional. Yet Appellee cites *Crowell vs. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932) as upholding the constitutionality of that Act. The mere citation points out that this Act has been recognized as constitutional for over thirty-two years at the time the policy in question was written.

Reading typewritten Endorsement No. 4, setting up $100,000 limit on Coverage One (b), without any other restriction whatever points out that Coverage One (b) was not meant to be limited, as Appellee contends.

Appellee's brief (p. 7) points out that the Washington King County Superior Court has ruled on this identical issue in favor of Firemen's Fund. It is im-

portant to note in that context, however, that the Superior Court in its Finding of Fact XII took judicial notice of the District Court decision from which this appeal is taken. In essence, Judge James merely followed Judge Bolt's earlier opinion and perpetuated the earlier error.

We should also direct the Court's attention to a very similar case to the one at hand from this Circuit, where the effect of an endorsement or rider was subject to construction. In the case of *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.,* this Court stated:

> "It is contended that the rider was intended to express all the risk incurred by the insurer. We do not so construe it. It is true it begins with the words 'This policy is to cover only as follows:' but we think the words mean no more than that the insurer intended to substitute the two provisions contained in the rider for corresponding provisions in the body of the policy, and that as to those two provisions the policy was 'to cover only' as expressed in the rider. One of the substituted provisions is the collision clause, which differs in form from and takes the place of the collision clause which was deleted from the body of the Aetna policy. The provision in the riders as to loss or damage caused by fire appears to have been inserted for the purpose of limiting such loss to the 'terms and conditions of the regular California standard form of fire policy as issued by the Aetna Insurance Company.' In the body of the policy fire is simply mentioned as one of the risks insured against.
>
> "The same construction, we think, should be given to the other two policies, although there are no deletions therein. They each contain in the body of the policy a fire risk and a collision clause. It is the language of the insurance company that we are called upon to construe, 'and it is both

reasonable and just that its own words should be construed most strongly against itself.' *National Bank v. Insurance Co.,* 95 U.S. 673, 679, 24 L.Ed. 563; *Thompson v. Phoenix Ins. Co.*, 136 U.S. 287, 10 Sup. Ct. 1019, 34 L.Ed. 408. Light is thrown upon the defendant's own understanding of the contract by the fact that when notified of the abandonment of the vessel, they made no claim that loss occurred from a cause not insured against, but wrote to the plaintiff that their policies 'were rescinded and voided by the unseaworthiness of said vessel which caused her loss.' "

Aetna Ins. Co. v. Sacramento-Stockton S.S. Co., 273 F. 55 at 58 (CA9, 1921).

On the basis of the contract of insurance in effect it is submitted that summary judgment should be granted as requested by Appellant.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

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